



STATE OF WISCONSIN

CIRCUIT COURT
Branch 9

DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

Case No.: 04-CV-1709

ABBOTT LABORATORIES, *et al.*,

Defendants.

**MOTION FOR PARTIAL SUMMARY JUDGMENT, PROPOSED FINDINGS OF FACT
AND SUPPORTING MEMORANDUM FILED BY DEFENDANTS TEVA
PHARMACEUTICALS USA, INC., IVAX CORPORATION, IVAX
PHARMACEUTICALS, INC., AND SICOR, INC.**

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MOTION FOR PARTIAL SUMMARY JUDGMENT AND GROUNDS IN SUPPORT

Pursuant to Wis. Stat. § 802.08 *et seq* and the Court’s standing order on motions for summary judgment, Teva Pharmaceuticals USA, Inc., Ivax Corporation, Ivax Pharmaceuticals, Inc., and Sicor, Inc. (collectively, “Teva”) hereby move for summary judgment on two of the State’s claims (Counts III and V) and partial summary judgment on two others (Counts I-II¹ and IV).

As grounds for this motion Teva respectfully represents that resolution of the issues raised in this motion as to Counts I-II and IV will help narrow the issues for trial, streamline trial proceedings, and avoid jury confusion. In the Pharmacia trial, despite the Court’s jury instructions, the Wisconsin Supreme Court concluded that the jury “had ‘completely missed the boat’” on one of the State’s core claims “as a result of the [State’s] decision to ‘adopt[] an unsustainable theory of recovery’” at trial²—necessitating lengthy post-trial briefing, and ultimately resulting in this Court vacating the jury’s special verdict. With this motion, Teva seeks to eliminate several of the State’s legally unsustainable claims *before* trial so that the parties can avoid similar jury confusion, conserve the Court’s resources, and expedite trial proceedings—thereby “secur[ing] the just, speedy and inexpensive determination” of this action. *See* Wis. Stat. § 801.01(2).

¹ Although the State brought two claims under Wis. Stat. § 100.18 as Counts I and II, this Court has ruled that they are not separate claims; thus, Counts I and II are addressed here together. *See* Order on Pls.’ Mot. for Partial SJ Against Novartis, AstraZeneca, Sandoz, and Johnson & Johnson at 3 (May 20, 2008) (attached as Ex. 1); *see also* Third Am. Compl. at 30 n.1 (acknowledging that “the Court has ruled that Count II is not a separate claim from Count I”).

² *See State v. Abbott Labs.*, 341 Wis. 2d 510, 561 (Wis. 2012) (alteration in original) (quoting this Court’s September 30, 2009 order). The Wisconsin Supreme Court was critical of the State’s theory, noting that there was “no authority to support” it and that it “flies in the face of the statute’s plain language, as well as every judicial decision on the issue.” *See id.* at 565-66.

Teva further represents that summary judgment is warranted for four independent reasons which Teva's memorandum in support of its motion explains in more detail:

First, while the State argues that Teva violated the Medical Assistance Fraud Act (Count IV) by reporting "false" Average Wholesale Prices ("AWPs") on which Wisconsin Medicaid relied, the State's own expert concedes that over 97% of claims for Teva's drugs were *not* reimbursed based on AWP's. For these claims, Teva's AWP's are neither "material" nor used to "determin[e] rights to a benefit or payment"—two separate elements of the Medical Assistance Fraud Act—and the bulk of Count IV fails as a result.

Second, the State's Medical Assistance Fraud Act and Deceptive Trade Practices Act claims (Counts IV and I-II) require proof that Teva made statements that were "false" and "untrue, deceptive or misleading," respectively. The State cannot make this showing for any claims after 2001, when it began receiving communications from Teva reporting Suggested Wholesale Prices ("SWP's") instead of AWP's. As indicated by the plain meaning of "suggested," SWP's never purported to be actual prices. This plain meaning was further reinforced by explicit disclaimers accompanying the SWP's, which stated that "[s]uggested wholesale prices do not reflect the actual cost to the pharmacy or charge to the customer." Accordingly, the State cannot show that Teva's SWP's were "false" or "untrue, deceptive or misleading."

Third, Teva is entitled to summary judgment on the Trust and Monopolies Act claim (Count III) because the State lacks proof that Teva's actions caused any competitive harm. Though this Court granted summary judgment for Pharmacia on the identical claim for this reason, the State has not filled this evidentiary gap in its case against Teva.

Fourth, the State’s unjust enrichment claim (Count V) fails because the State cannot show that it conferred any direct benefit on Teva, a basic prerequisite for this claim. The State voluntarily withdrew this claim against Pharmacia, but has yet to do so here. See Pl. State of Wisconsin’s (Corrected) Response to Pharmacia’s Mot. for Summary Judgment at 57, *State v. Abbott Labs, et al.*, No. 04-CV-1709 (Wis. Cir. Ct. Dec. 10, 2008) (attached as Ex. 2) (“ . . . the State voluntarily withdraws its claim of unjust enrichment against Pharmacia.”)

CLAIMS

A. Counts I and II: Deceptive Trade Practices Act, Wis. Stat. § 100.18(1) & (10)(b).

The elements of this claim are as follows:

1. “[W]ith the intent to induce an obligation, the defendant made a representation to ‘the public.’” *K&S Tool & Die Corp. v. Perfection Mach. Sales, Inc.*, 301 Wis. 2d 109, 121-22 (Wis. 2007) (citing Wis. Stat. § 100.18(1)).
2. “[T]he representation was untrue, deceptive or misleading.” *Id.* (citing Wis. Stat. § 100.18(1)).
3. “[T]he representation caused the plaintiff a pecuniary loss.” *Id.* (citing Wis. Stat. § 100.18(11)(b)(2)).

B. Count III: Wisconsin Trusts and Monopolies Act, Secret Rebates, Wis. Stat. § 133.05.

The elements of this claim are as follows:

1. Defendant made a “payment or allowance of rebates, refunds, commissions or unearned discounts.” Wis. Stat. § 133.05(1).
2. The payment or allowance was “secret.” *Id.*
3. The payment or allowance “injur[ed] or tend[ed] to injure a competitor or destroy[ed] or tend[ed] to destroy competition.” *Id.*; see also *Obstetrical & Gynecological Assocs. of Neenah, S.C. v. Landig*, 129 Wis. 2d 362, 369 (Ct. App. 1986).

C. Count IV: Medical Assistance Fraud Act, Wis. Stat. § 49.49(4m)(a)2.

The elements of this claim are as follows:

1. Defendant “[k]nowingly ma[d]e or cause[d] to be made any false statement or representation[.]” Wis. Stat. § 49.49(4m)(a)2.
2. The false statement or representation was “of a material fact[.]” *See id.*; *State v. Williams*, 179 Wis. 2d 80, 87 (Ct. App. 1993) (“Materiality is an element of medical assistance fraud.”).
3. The false statement or representation of a material fact was “for use in determining rights to a benefit or payment.” Wis. Stat. § 49.49(4m)(a)2.

D. Count V: Unjust Enrichment.

The elements of this claim are as follows:

1. “[A] benefit conferred upon the defendant by the plaintiff[.]” *Ludyjan v. Cont'l Cas. Co.*, 308 Wis. 2d 398, 405 (Ct. App. 2008) (citing WIS JI-CIVIL 3028).
2. “[K]nowledge or appreciation of the benefit by the defendant[.]” *Id.* (citing WIS JI-CIVIL 3028).
3. “[A]cceptance and retention by the defendant of such benefit under such circumstances that it would be inequitable for him or her to retain it without paying the value thereof.” *Id.* (citing WIS JI-CIVIL 3028).

TEVA’S ADDITIONAL PROPOSED UNDISPUTED FACTS (TAPUF)

1. Medicaid is a voluntary public health insurance program funded jointly by the states and the federal government and administered by the states. Third Am. Compl. ¶ 61; 42 U.S.C. § 1396 *et seq.*

2. Wisconsin has elected to participate in Medicaid. Among other healthcare services, Wisconsin has chosen to provide its Medicaid beneficiaries with coverage for prescription drugs. Third Am. Compl. ¶ 61.

3. Wisconsin Medicaid³ does not buy drugs directly from pharmaceutical manufacturers such as Teva, but rather reimburses pharmacies that dispense those drugs to

³ This brief uses “Wisconsin Medicaid” and the “Agency” to refer to the Wisconsin Department of Health and Family Services (“DHFS”), which was previously called the Department of Health and Social Services (“DHSS”) and has since changed its name to the Department of Health Services.

program beneficiaries. Tr. of Dep. of James Vavra (“Vavra Tr.”) at 543:17-544:4 (Aug. 16, Sept. 26-27, 2007) (excerpts attached as Ex. 3).

4. Wisconsin has flexibility to determine its reimbursements to pharmacies, subject only to a cap imposed by federal regulations. For drugs other than those for which the federal government has set a Federal Upper Limit (“FUL”), Wisconsin Medicaid’s reimbursements to pharmacies are capped at the lower of the (1) estimated acquisition cost (“EAC”) plus reasonable dispensing fees established by the state agency; or (2) the providers’ usual and customary (“U&C”) charges to the general public. 42 C.F.R. § 447.512(b) (formerly § 447.331(b)). This reimbursement cap applies “in the aggregate;” that is, for all drugs together. *Id.*

5. In Wisconsin, as in other states, Medicaid reimbursements are set through a budgetary process involving the Governor and Legislature. Tr. of Dep. of Rachel Carabell (“Carabell Tr.”) at 28:5-10 (Sept. 30, 2008) (excerpts attached as Ex. 4).

6. Wisconsin’s budget is biennial. Carabell Tr. at 17:17-18 (Ex. 4).

7. Every other year, state agencies including Wisconsin Medicaid submit a budget request to the Governor’s office. Tr. of Dep. of Amie Goldman (“Goldman Tr.”) at 42:12-43:11 (Oct. 13, 2008) (excerpts attached as Ex. 5); Vavra Tr. at 103:14-104:9 (Ex. 3). This proposed budget may include a recommended change to Medicaid drug reimbursement. Vavra Tr. at 220:8-14 (Ex. 3). The Governor reviews the Agency’s requests and submits a proposed budget to the Legislature. *Id.* at 105:4-11.

8. The Governor’s budget is referred to the Joint Committee on Finance (“JCF”), a legislative body consisting of Assembly members and Senators. Goldman Tr. at 43:12-18 (Ex. 5); Vavra Tr. at 224:8-225:6, 227:19-22 (Ex. 3).

9. JCF modifies the Governor's budget proposal and then introduces it to the Legislature. Goldman Tr. at 46:12-47:16 (Ex. 5).

10. Once the budget is passed by the Legislature, it is submitted to the Governor for his signature. Tr. of Dep. of Mark Moody ("Moody Tr.") at 97:11-16 (Nov. 4, 2008) (excerpts attached as Ex. 6).

11. Any reimbursement formula change that is approved by the Legislature and Governor is included in a State Plan Amendment ("SPA") drafted by Wisconsin Medicaid, signed by the Governor's Office, and submitted for approval to the Department of Health and Human Services Centers for Medicaid & Medicaid Services ("CMS") (previously known as the Healthcare Financing Administration, or "HCFA"), the federal agency responsible for the Medicaid program. Vavra Tr. at 31:12-32:13; 33:9-16; 81:2-83:6 (Ex. 3).

12. CMS has never rejected an SPA related to pharmacy reimbursement submitted by Wisconsin. Tr. of Dep. of Peggy Handrich at 146:4-7 (Dec. 2, 2008) (attached as Ex. 7).

13. The State must provide public notice and an opportunity for comment regarding any changes to its reimbursement formula prior to the effective date. Vavra Tr. at 106:12-107:13, 112:19-113:9 (Ex. 3).

14. Over the years, pharmacies and their lobbying groups have opposed proposed reimbursement changes in Wisconsin. *See, e.g.*, Vavra Tr. at 113:20-115:2 (Ex. 3); Letter from Pharmacy Society of Wisconsin ("PSW") to Wisconsin Legislature at PSW_00013214-15 (Mar. 23, 1999) (attached as Ex. 8) (requesting support of Wisconsin Legislature in opposing proposal to reduce reimbursement to AWP-18%).

15. This opposition has influenced the State's decisions regarding proposed reimbursement changes. *Id.* at PSW_00013219 (Mar. 23, 1999) (attaching October 16, 1998 letter from Governor to PSW stating that he will not approve proposal to reduce reimbursement).

I. The Vast Majority of Teva's Drugs Were Reimbursed Based on Prices Other Than AWP.

16. Teva manufactures and sells generic drugs. Tr. of Dep. of Paul Krauthauser ("Krauthauser Tr.") at 42:19-43:5 (Jan. 29, 2008) (excerpts attached as Ex. 9); Tr. of Dep. of Corrine Hogan at 51:14-16 (June 17, 2008) (excerpts attached as Ex. 10) (discussing Ivax).

17. During the period at issue in this case, Wisconsin reimbursed generic drugs according to maximum allowable cost ("MAC," which is a price set by Wisconsin Medicaid), FUL, discounted AWP, or a provider's usual and customary charge. Expert Report of Zachary Dyckman ("Dyckman Rep.") at 68, Exhibit 5 (June 3, 2014) (attached as Ex. 11) (showing Wisconsin Medicaid bases of payment for Teva drugs); State Plan Amendment No. 90-0006 at WI-Prod-AWP-011366 (Apr. 17, 1990) (attached as Ex. 12); State Plan Amendment No. 96-012 at WI-Prod-AWP-024386 (Sept. 17, 1996) (attached as Ex. 13); State Plan Amendment No. 01-009 at WI-Prod-AWP-027602 (June 7, 2002) (attached as Ex. 14); Letter from Peggy Handrich to Cheryl Harris, CMS at WI-Prod-AWP-123639 (Sept. 25, 2003) (attached as Ex. 15) (describing SPA).

18. If Wisconsin Medicaid had established a MAC price for a generic drug, that price would be used, even if the use of discounted-AWP would have resulted in lower reimbursement. Tr. of Dep. of Kimberly Smithers ("Smithers Tr.") at 193:18-194:7 (Aug. 15, 2007) (excerpts attached as Ex. 16). *See also id.* at 204:21-205:5 (agreeing that "in the case of a drug that's on the MAC list, the allowed amount is going to be determined using the MAC price," and that "the MAC price is chosen as the allowed amount unless the usual and customary is lower"); DHSS

Medical Assistance Provider Bulletin at 2 (June 1, 1990) (attached as Ex. 17) (“The Wisconsin Maximum Allowed Cost (MAC) List dated 7/15/89 will be used for determining EAC for all drugs on the list; . . . EAC for all other drugs will be determined by using the published AWP maintained by First Data Bank and applying a 10 percent discount.”); Mem. from Peggy Bartels to Mark Gajewski at WI-Prod-AWP-044636 (Sept. 21, 1998) (attached as Ex. 18) (directive to EDS stating that AWP is used for “generic drugs not on the MAC list”); DHFS, 1999-2001 Biennial Budget Issue Paper at WI-Prod-AWP-108297 (Sept. 15, 1998) (attached as Ex. 19) (“Average Wholesale Price (AWP) minus 10% is used for most brand products . . . and generic drugs not on the MAC list.”).

A. Most of Teva’s Drugs Were Reimbursed Based on State-Set MACs, Not AWP.

19. A MAC price is an upper limit of reimbursement established by Wisconsin Medicaid. Tr. of Dep. of Theodore Collins (“Collins Tr.”) at 15:21-16:9; 24:6-10 (Oct. 30, 2007) (excerpts attached as Ex. 20).

20. In Wisconsin, most generic drugs are reimbursed based on MAC prices. *See, e.g.*, Mem. from Mike Boushon, Pharmacy Consultant to Peggy Bartels, Director, Bureau of Health Care Financing, and Dr. Dally at WI-Prod-AWP-097939 (Nov. 24, 1989) (attached as Ex. 21) (noting that “EAC is set at Wisconsin Maximum Allowed Cost (MAC) for generics”); Mem. from Christine Nye, Director, Bureau of Health Care Financing to George F. MacKenzie, Administrator, Division of Health at WI-Prod-AWP-097965 (Jan. 12, 1990) (attached as Ex. 22) (“Generic drugs are generally priced according to federally imposed upper limits as Wisconsin Maximum Allowed Costs (MAC).”); Script of Address to Assembly Committee on Insurance by Mark Moody, Administrator, DHFS, at WI-Prod-PDF-006879 (Apr. 24, 2003) (attached as Ex. 23) (“[A]bout 75% of generics (over 1,000 drugs) are on the MAC list”); Vavra Tr. at 579:8-

580:5 (Ex. 3) (recalling that since 2004, around 98% of generic drugs have been reimbursed according to MAC).

21. Nearly 79% of the Medicaid claims involving the Teva drugs at issue in this litigation were reimbursed on the basis of MAC prices set by Wisconsin Medicaid. Dyckman Rep. at 68, Exhibit 5, ¶ 143 (Ex. 11). Although Plaintiffs' damages expert, Dr. Thomas DiPrete, failed to calculate the exact percentage of Teva claims reimbursed based on MAC, he agreed that the "vast majority of claims were reimbursed on the basis of a state MAC price as opposed to some other pricing metric." Tr. of Dep. of Thomas A. DiPrete ("DiPrete Tr.") at 232:1-236:22 (Apr. 24, 2014) (excerpts attached as Ex. 24). *See also* Economic Damages Report of Thomas A. DiPrete ("DiPrete Rep.") at 21 (Apr. 1, 2014) (attached as Ex. 25).

22. MAC prices are set based on actual market prices. Wisconsin Medicaid officials look to a variety of sources of pricing data in order to set MAC prices. Since 1999, for example, Wisconsin Medicaid has accessed and utilized actual pricing information from major drug wholesalers, including national wholesalers Cardinal and McKesson, and regional Wisconsin wholesaler F. Dohmen Company. Collins Tr. at 15:21-17:14; 62:15-22; 136:18-137:21, 141:21-142:4 (Ex. 20); Tr. of 30(b)(6) Dep. of Theodore Collins ("Collins 30(b)(6) Tr.") at 25:14-26:3 (Dec. 20, 2007) (excerpts attached as Ex. 26); Tr. of Dep. of Carrie Gray ("Gray Tr.") at 59:2-9 (Sept. 27, 2007) (excerpts attached as Ex. 27).

23. The State has also established MAC prices using information obtained from pharmacy buying groups such as Independent Pharmacy Co-Op, an internet-based buying group for pharmacies in Wisconsin and other states, and the Minnesota Multi-State Contracting Alliance for Pharmacy, a buying group composed of various states, including Wisconsin. Min.

Tr. of Dep. of Michael Boushon (“Boushon Tr.”) at 195:14-197:5 (Nov. 5, 2007) (excerpts attached as Ex. 28); Collins 30(b)(6) Tr. at 26:7-11 (Ex. 26).

24. Wisconsin Medicaid also used internet pricing sources, such as veterinary internet site Vet Net, to set MAC prices. Collins 30(b)(6) Tr. at 26:4-6 (Ex. 26); Gray Tr. at 82:3-83:16 (Ex. 27) (indicating access to Vet Net prices since at least 2000).

25. After reviewing these sources and locating the lowest price at which a product is available, Wisconsin Medicaid added a mark-up of between 10 and 25 percent to ensure a variety of pharmacies—from independent pharmacies serving rural Wisconsin to big chains (*e.g.*, Wal-Mart, Costco, and Walgreen)—are able to purchase the product at the MAC price. Collins Tr. at 74:19-76:22 (Ex. 20); E-mail from Ted Collins to Carrie Gray (Apr. 11, 2003 9:29AM) at WI-Prod-AWP-068457 (attached as Ex. 29) (“Most MACs were set at least 20% more than acquisition price at IPC cooperative or other sources.”).

26. Even with this mark-up, however, Wisconsin’s MAC prices have been considered particularly aggressive, sometimes approximating actual acquisition cost, or even lower. *See, e.g.*, Collins 30(b)(6) Tr. at 29:5-16 (Ex. 26) (“Wisconsin’s MAC program is sort of the model for aggressive MAC prices.”); Dr. David H. Kreling, *A Comparison of Pharmacists’ Acquisition Costs and Potential Medicaid Prescription Ingredient Cost Reimbursement in Wisconsin* at 1 (1991) (attached as Ex. 30) (“For most pharmacists, a sizeable proportion of multisource drugs could not be purchased at maximum allowable cost (MAC) amounts.”); Governor’s Commission on Pharmacy Reimbursement, Final Report, at WI-Prod-AWP-111836 (Mar. 30, 2006) (“2006 Governor’s Commission Report”) (attached as Ex. 31) (concluding that the State’s payment for generic drugs “is, on average, very close to the pharmacies’ actual costs of acquiring them”).

27. Wisconsin Medicaid does *not* use Average Wholesale Prices to set MAC prices. Ted Collins, the pharmacy practices consultant responsible for setting MACs from 1979 to 1984 and 1999 to present day, confirmed that Wisconsin Medicaid has not used AWP to establish the level of MAC prices. Collins Tr. at 24:6-25:16; 38:21-39:2; 100:6-102:10, 131:22-132:22, 160:21-161:3 (Ex. 20); Collins 30(b)(6) Tr. at 20:6-24:20 (Ex. 26). Michael Boushon, who served as a pharmacy practices consultant for Wisconsin Medicaid from 1985 to 1995 and 2003 to 2004, similarly testified that he could not recall ever relying on an AWP price published by a generic manufacturer in setting MACs. Boushon Tr. at 18:14-21; 40:13-17; 197:14-17 (Ex. 28).

B. A Small Percentage of Teva Drugs Were Reimbursed Based on FUL, U&C, and AWP.

28. Although Wisconsin Medicaid reimbursed the vast majority of Teva drugs using MAC prices, it also reimbursed some drugs based on U&C, FUL, and discounted AWP. Dyckman Rep. at 68, Exhibit 5 (Ex. 11).

29. A “usual and customary” charge is generally defined in Wisconsin as “the amount charged by a provider for the same service when provided to a non-Medicaid patient.” *See* State Plan Amendment No. 01-009 at WI-Prod-AWP-027603 (June 7, 2002) (Ex. 14). Providers determine the U&C for a drug and submit that price to Wisconsin Medicaid as part of the claims process. Carabell Tr. at 244:1-10 (Ex. 4).

30. Only a small percentage of claims for Teva drugs were reimbursed in Wisconsin based on U&C. Dyckman Rep. at 68, Exhibit 5 (Ex. 11) (10.4% of claims were based on U&C).

31. Wisconsin Medicaid also reimbursed a limited number of claims for Teva drugs using FULs. *See* Dyckman Rep. at 68, Exhibit 5 (Ex. 11) (only 5.4% of claims for Teva drugs were reimbursed in Wisconsin based on FULs); DiPrete Rep. at 21 (Ex. 25) (only 5.56% of

claims for Teva Pharmaceuticals drugs and 7.65% of claims for Ivax drugs were reimbursed based on FUL).

32. The amount of claims for Teva drugs reimbursed based on AWP was even lower than the amount based on U&C or FULs. Both parties' experts agree that the percentage of Teva claims reimbursed based on AWP was less than 2.6%. *See, e.g.*, Dyckman Rep. at 68, Exhibit 5 (Ex. 11) (2.1% of claims for Teva drugs); DiPrete Rep. at 21 (Ex. 25) (only "2.3% of the Medicaid claims for Teva drugs" and only "2.54% of the Medicaid claims for Ivax drugs" were reimbursed "based on a discounted AWP"); DiPrete Tr. at 229:22-230:4, 233:11-15 (Ex 24) (confirming these numbers). Thus, over 97% of claims for Teva's and Ivax's drugs were not reimbursed based on AWP. *Id.*

II. The State Knew that AWP—and Later SWP—Was Not a Real Price and Was Significantly Higher than Acquisition Cost.

A. The State Has Known Since the 1970s that AWP Does Not Approximate Acquisition Cost.

33. AWP is a misnomer: it is not an average of the net prices paid by pharmacies for a particular drug. Congressional Budget Office, *Prescription Drug Pricing in the Private Sector*, at 3 (January 2007) (attached as Ex. 32) ("The AWP is a published list price for a drug sold by wholesalers to retail pharmacies and nonretail providers. However, in practice, the AWP is not what retail pharmacies and nonretail providers pay for drugs. . . ."); Office of the Inspector General of the U.S. Department of Health and Human Services ("OIG"), *Changes to the Medicaid Prescription Drug Program Could Save Millions* at HHC011-2207 ("1984 OIG Report") (Sept. 1, 1984) (attached as Ex. 33) ("AWP means non-discounted list price. Pharmacies purchase drugs at prices that are discounted significantly below AWP or list price.").

34. AWP was created in 1969 by the California Medicaid program to simplify the process of reimbursing pharmacies. George Pennebaker, *The Rest of the AWP Story*, Computer Talk at 2 (Jan./Feb. 1998) (attached as Ex. 34).

35. Even at this time, however, AWP did not reflect discounts typically received by pharmacies and thus overstated pharmacies' net prices by 12 to 15 percent. Weekly Pharmacy Reports, *The Green Sheet, Actual Acquisition Cost Should Replace "Average Whsle. Price"* at 3 (Mar. 22, 1971) (attached as Ex. 35).

36. The State has known that AWP is higher than acquisition cost since at least the 1970s, when the federal government reported to states that AWP is an inflated number and recommended that states use alternative metrics to reimburse Medicaid drugs. In November 1974, for example, the Department of Health, Education and Welfare ("HEW") proposed a rule that would require states to reimburse at actual acquisition cost rather than AWP, noting that "published wholesale prices . . . are frequently higher than prices actually paid by providers." HEW, *Maximum Allowable Cost for Drugs*, Notice of Proposed Rulemaking, 39 Fed. Reg. 40302 at 40303 (Nov. 15, 1974) (attached as Ex. 36).

37. On February 7, 1975, Wisconsin Lieutenant Governor Martin J. Schreiber responded to HEW with support for the proposal, agreeing that Wisconsin's current practice of reimbursing at undiscounted AWP "allows providers to earn uncontrolled profits through bulk purchases, discounts from suppliers and inadequate monitoring of billing practices." Letter from Wisconsin Lt. Gov. Martin Schreiber to the Food and Drug Administration, HEW, at 1 (Feb. 7, 1975) (attached as Ex. 37).

38. Later that year, the Governor appointed a Medicaid Pharmacy Task Force to examine alternative methods of drug reimbursement. Draft Medicaid Pharmacy Task Force Report at 1 (Jan. 16, 1976) (attached as Ex. 38).

39. The Task Force concluded that “the Blue Book prices overstate actual drug costs,” citing an “estimate made by a federal agency that a 15 percent spread exists between Blue Book price and the actual wholesale price.” *Id.* at 3.

40. Although the Task Force recommended that the State reimburse Medicaid providers at actual acquisition cost (“invoice cost minus bulk purchasing discounts plus billed warehouse costs”), *id.* at 5, the State did not adopt this recommendation. Vavra Tr. at 180:15-181:9, 202:4-203:6 (Ex. 3).

B. Since that Time, the State Has Continuously Rejected Calls to Significantly Reduce Reimbursement.

1. In 1990, the State Rejected Reimbursement Based on Actual Acquisition Cost in Favor of Discounted AWP.

41. In 1984, Wisconsin Medicaid received and reviewed a report published by the OIG titled “Changes to the Medicaid Prescription Drug Program Could Save Millions.” 1984 OIG Report (Ex. 33); Vavra Tr. at 474:2-475:14 (Ex. 3). The OIG sought to alert state Medicaid agencies “to the opportunity for significant reductions in program expenditures if actions are taken to stop the present widespread use of average wholesale prices (AWP) in determining program reimbursement for prescription drugs.” 1984 OIG Report at HHC011-2207 (Ex. 33). The report warned that “[p]harmacies purchase drugs at prices that are discounted *significantly below* AWP or list price,” at an average of “about 16 percent below AWP.” *Id.* at HHC011-2207-2208 (emphasis added).

42. Wisconsin Medicaid responded to HCFA a few months later, stating that it “generally agree[d] with the findings of the study, in that a reduction in drug reimbursement

levels is possible by implementing a system not based on Average Wholesale Price (AWP) as an upper reimbursement limit.” Letter from Linda Reivitz to Barbara Gagel at 1 (June 10, 1985) (attached as Ex. 39). The Agency cautioned that “reductions [in reimbursement] are certain to cause dissatisfaction and may impact provider participation in Wisconsin.” *Id.* at 2.

43. In 1989, recognizing that AWP “without a significant discount being applied” would no longer be acceptable to HCFA, Wisconsin Medicaid considered various alternatives to undiscounted AWP, including actual acquisition cost and AWP-10%, the latter of which the agency believed “might” be acceptable to HCFA. Mem. from Mike Boushon to Peggy Bartels and Dr. Dally at WI-Prod-AWP-097939-40 (Nov. 24, 1989) (Ex. 21); Vavra Tr. at 199:7-12 (Ex. 3).

44. Rather than adopting actual acquisition cost, the State chose to adopt AWP-10%. Vavra Tr. at 202:21-203:6, 394:16-21 (Ex. 3); DHSS Medical Assistance Provider Bulletin at WI-Prod-AWP-031167 (June 1, 1990) (Ex. 17).

2. In 1999, the State Rejected a Proposal to Increase the AWP Discount to 18%.

45. Nearly a decade later, Wisconsin Medicaid proposed further decreasing reimbursement to AWP-18%. DHFS, 1999-2001 Biennial Budget Issue Paper at WI-Prod-AWP-108300 (Sept. 15, 1998) (Ex. 19).

46. In support of its proposal, DHFS cited two studies published by the OIG in 1997 “which found that pharmacies generally obtain brand drug products from their wholesaler at an average price of AWP minus 18.3%,” and that “[m]any generic drugs are discounted more than 20%.” *Id.* at WI-Prod-AWP-108298.

47. After protests from pharmacies about the proposed reduction, the Governor’s Office met with pharmacy lobbying groups and promised not to reduce reimbursement. Mem.

from Chris Decker to members of PSW (Mar. 4, 1999) (attached as Ex. 40); Letter from PSW to Wisconsin Legislature at PSW_00013219 (Mar. 23, 1999) (Ex. 8) (attaching letter from Governor stating that he “will not approve this request to reduce the Medicaid pharmacist reimbursement in the 1999-2001 biennial budget”).

48. The Legislature ultimately kept reimbursement at AWP-10%. Vavra Tr. at 416:4-17 (Ex. 3).

3. In 2001, Wisconsin Began to Receive Disclaimers from Teva Regarding “Suggested Wholesale Price.”

49. In the late 1990s, Teva began sending Wisconsin Medicaid drug price notification letters that included the disclaimer that “[a]verage wholesale prices do not reflect the actual cost to the pharmacy or charge to the customer.” Letter from Teva to Mike Boushon (Dec. 27, 1999) (attached as Ex. 41); *see also* Letter from Teva to Mike Boushon at WI-Prod-AWP-129604 (Mar. 13, 2000) (attached as Ex. 42).

50. Around 2001, Teva began using the phrase “Suggested Wholesale Price” (“SWP”) instead of AWP in order to provide states with “additional clarity as to what the figure represents.” Krauthauser Tr. at 49:10-16, 54:4-7 (Ex. 9); Letter from Teva to Roma Rowlands at WI-Prod-AWP-129542 (Sept. 18, 2001) (attached as Ex. 43) (reporting SWP for new drug).

51. Teva’s communications to Wisconsin Medicaid accordingly began to include the following statement: “Suggested wholesale prices do not reflect the actual cost to the pharmacy or charge to the customer.” *See, e.g.*, Letter from Teva to Wisconsin Medicaid at WI-Prod-AWP-129526 (Aug. 2, 2001) (attached as Ex. 44); Letter from Teva to Roma Rowlands at WI-Prod-AWP-129542 (Sept. 18, 2001) (Ex. 43); Letter from Teva to Roma Rowlands (Sept. 16, 2003) (attached as Ex. 45); Letter from Teva to Wisconsin Medicaid (Dec. 22, 2006) (attached as Ex. 46).

4. In 2001, the State Rejected a Proposal to Increase the AWP Discount to 15%.

52. In the fall of 2000, Wisconsin Medicaid proposed reducing reimbursement to AWP-15% for the 2001-2003 biennial budget, reiterating that Wisconsin “provides higher reimbursement to pharmacy providers for their cost of drugs than other payers,” and that AWP “is known to represent more than cost.” DHFS, 2001-2003 Biennial Budget Issue Paper at WI-Prod-AWP-117906-08 (Sept. 22, 2000) (attached as Ex. 47).

53. This proposal was supported by the Governor’s Office, which, in letters to pharmacies, cited a recent OIG report regarding the gap between AWP and acquisition cost for brand drugs. *See, e.g.*, Letter from Gov. McCallum to Al Bennin, Walgreen at 1 (Mar. 14, 2001) (attached as Ex. 48).

54. Still, following protests from pharmacy lobbying groups, the Legislature only increased the discount to 11.25%. State Plan Amendment No. 01-009 at WI-Prod-AWP-027602 (Ex. 14); Milwaukee Journal Sentinel, *Keeping Drugs Affordable* (Sept. 7, 2001) (attached as Ex. 49) (reporting that “[b]ecause of lobbying by pharmacies and their representatives, the [reimbursement rate] discount was knocked down from the proposed 15% to 11.2% [sic].”).

5. In 2003, the State Again Rejected a Proposal to Increase the AWP Discount.

55. In 2002, the OIG released the results of its study of acquisition costs for Wisconsin pharmacies, reporting that the overall discount below AWP was 20.52% for brand name drugs and 67.28% for generic drugs. OIG Report, *Review of Pharmacy Acquisition Costs for Drugs Reimbursed Under the Medicaid Prescription Drug Program of the Wisconsin Department of Health and Family Services* at WI-Prod-AWP-104224-25 (Mar. 2002) (attached as Ex. 50).

56. DHFS agreed to consider the report's findings, and used it to inform future reimbursement proposals. *Id.* at WI-Prod-AWP-104234; Vavra Tr. at 504:1-7 (Ex. 3).

57. In 2002, Wisconsin Medicaid also sponsored its own study of pharmacy dispensing and acquisition costs, which found that the average percentage difference between AWP and actual cost ranged from 17.52% to 17.58% for brand name drugs and 74.44% to 76.16% for multisource drugs. Dr. David H. Kreling, *Pharmacy Cost of Dispensing/Acquisition Cost Study* at WI-Prof-AWP-106308 (Mar. 6, 2002) (attached as Ex. 51).

58. In early 2003, both Wisconsin Medicaid and the Governor's Office renewed their efforts to move the State to AWP-15%. Letter from Helene Nelson to Hon. Dean Kaufert (Mar. 25, 2003) (attached as Ex. 52).

59. Pharmacy lobbying groups continued to oppose any reduction in reimbursement. *See, e.g.*, Letter from Mike Dow, PSW President, to PSW Members (Feb. 27, 2003) (attached as Ex. 53) (urging members to contact state legislators regarding proposed cuts).

60. The Legislature compromised by agreeing to move to AWP-12% for the first year of the biennium, after which reimbursement would decrease to AWP-13%. Vavra Tr. at 435:20-436:13 (Ex. 3). Pharmacy lobbying groups took credit for the State's rejection of AWP-15%. Email from Chris Decker to members of PSW (May 28, 2003 12:45 PM) (attached as Ex. 54).

6. In 2004, the State Withdrew an SPA That Would Have Increased the AWP Discount to 16%.

61. In late 2004, when the State began reimbursing pharmacies at AWP-13%, the Governor proposed further reducing reimbursement to AWP-16%. Legislative Fiscal Committee, Paper #371 at WI-Prod-AWP-105388 (May 26, 2005) (attached as Ex. 55).

62. DHFS supported this proposal, citing recent studies and pricing information showing that actual acquisition cost for brand drugs ranged from AWP-17.2% to AWP-26.81%.

DHFS, 2005-2007 Biennial Budget Issue Paper at WI-Prod-AWP-106501 (Jan. 25, 2005) (attached as Ex. 56).

63. Although the Legislature rejected this proposal, the Governor exercised his veto power to implement the reduction. Letter from Senate Majority Leader Dale W. Schultz to Thomas Raabe (July 7, 2005) (attached as Ex. 57) (describing JCF's vote to restore proposed cut to Medicaid program); E-mail from Nicole Valentine to Members of the National Association of Chain Drug Stores at NACDS-WI 0170 (July 28, 2005 12:13 AM) (attached as Ex. 58) (discussing line-item vetoes).

64. Nevertheless, in September 2005, the Governor withdrew the SPA, deciding instead to appoint a Pharmacy Reimbursement Commission to find a way to lower costs without reducing reimbursement. Letter from Mark Moody to Verlon Johnson, CMS (Sept. 26, 2005) (attached as Ex. 59) (withdrawing SPA); E-mail from James Johnston to Helene Nelson at WI-Prod-AWP-110323-325 (Sept. 16, 2005) (attached as Ex. 60) (attaching draft letter from Department of Administration to Wisconsin Medicaid describing Governor's Commission).

65. The Governor's Commission issued its final report on March 30, 2006. It reiterated that AWP exceeded pharmacies' actual acquisition cost, and referred to AWP as a "reference price" that "does not represent [] the actual cost of the product." 2006 Governor's Commission Report at WI-Prod-AWP-111857 (Ex. 31).

66. The Governor's Commission ultimately recommended that the State decrease reimbursement to AWP-15%. *Id.* at WI-Prod-AWP-111837.

67. However, the Legislature declined to adopt this recommendation. Vavra Tr. at 158:4-15 (Ex. 3) (as of August 16, 2007, reimbursement remained at AWP-13%).

68. It wasn't until 2008 that the State reduced reimbursement further, when it chose to move to AWP-14%, a discount that was still below recent proposals made to the State. Letter from Larry Reed to Jason Helgerson (Aug. 28, 2009) (attached as Ex. 61) (approving SPA).

C. The State Relies on One Liability and One Damages Expert.

69. The State has offered two experts in this case: a liability expert, Dr. Gerard Anderson, and an economic damages expert, Dr. Thomas A. DiPrete. *See generally* Expert Disclosure of Dr. Gerard Anderson Regarding AstraZeneca, Aventis, Novartis, and the Teva Defendants (Teva, Ivax, Sicom) ("Anderson Rep.") (Apr. 1, 2014) (attached as Ex. 62); DiPrete Rep. (Ex. 25).

70. The State's liability expert, Dr. Anderson, has not opined that Teva's alleged conduct has caused anticompetitive harm. He does not define a market, does not opine as to how Teva's alleged actions harmed the competition, and does not opine that Teva's pricing structure has had an anticompetitive effect. *See generally* Anderson Rep. (Ex. 62).

71. While Dr. Anderson generally opines that increasing the spread between a pharmacy's acquisition cost and the amount paid by a state Medicaid program "benefits drug companies because they may sell more of their drug," Anderson Rep. at 4 ¶ 18 (Ex. 62), he does not opine as to whether Teva in particular has increased its sales, market share, and profits, and does not opine that Teva has done so at Wisconsin's expense. *Id.* at 7 ¶ 30(d).

72. Dr. DiPrete has opined only to damages. DiPrete Tr. at 15:4-10 (Ex. 24) (stating that he "perform[ed] calculations on overpayments that [he] suppose[d] under the state's theory of the case would be damages"). He was specifically "asked to compare the difference between these average wholesale prices published by First DataBank and the actual average wholesale prices that were paid by purchasers." *Id.* at 74:5-17.

73. Dr. DiPrete offers no opinions as to liability or causation of damages. DiPrete Tr. at 67:3-11 (Ex. 24) (agreeing that he is “not offering any opinions with respect to liability in this case” and that he is “not offering any opinions with respect to causation”); *id.* at 222:13-18 (“ . . . my testimony is not on liability or causation”).

74. Dr. DiPrete has also not offered an opinion as to whether Teva harmed its competition or received any benefit from Wisconsin directly. *See generally* DiPrete Rep. (Ex. 25).

75. Although Dr. DiPrete purported to calculate the total number of Teva’s and Ivax’s drug NDCs reimbursed by Wisconsin during the damages period, these calculations do not include the number of times Wisconsin Medicaid actually relied on Teva’s AWP’s for reimbursement. DiPrete Rep. at 20 (Ex. 25); DiPrete Tr. at 238:13-239:5 (Ex. 24) (this calculation is not “counting the number of claims that are reimbursed on the MAC as opposed to the AWP,” but is “counting whether an NDC was reimbursed in a given period”); *id.* at 237:18-238:2 (unable to say to what extent this calculation includes “reimbursements that were not paid based on an AWP minus formula”).

ARGUMENT

Summary judgment, whether complete or partial, should be granted when there is no genuine issue as to any material fact and when the moving party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2); *see Schey v. Chrysler Corp.*, 228 Wis. 2d 483,486-87 (Ct. App. 1999). Once the party seeking summary judgment has demonstrated that there are no triable issues of material fact on the issues presented, the opposing party—here, the State—must “make a showing sufficient to establish the existence of an element essential to [its] case.” *Transp. Ins. Co. v. Hunzinger Constr. Co.*, 179 Wis. 2d 281, 291-92 (Ct. App. 1993) (citation and internal quotation marks omitted). “Mere conclusory assertions are not enough.” *Dahm v.*

City of Milwaukee, 288 Wis. 2d 637, 639-40 (Ct. App. 2005). Instead, the opposing party “must set forth specific facts showing that there is a genuine issue for trial”— and if it cannot, summary judgment “shall be entered against such party.” Wis. Stat. § 802.08(3).

I. Teva Is Entitled to Summary Judgment on the Medical Assistance Fraud Act Claim for All Teva Drugs Not Reimbursed Based on AWP.

The State claims that Teva violated the Medical Assistance Fraud Act by making false statements—which under the State’s theory means reporting “false” AWP—that Wisconsin Medicaid then used in its reimbursements. *See* Third Am. Compl. ¶ 94. To prevail, the State must prove, among other elements, that: (1) Teva’s AWP were “for use in determining rights to a benefit or payment” and (2) that they were “material.” Wis. Stat. § 49.49(4m)(a)2. But as the State’s own damages expert concedes, the “vast majority”⁴ of Teva’s drugs were *not* reimbursed based on AWP. Thus, for these pharmacy claims, Teva’s AWP were neither “material” nor used to “determin[e] rights” to Medicaid payments. Those AWP cannot support two separate and essential elements of the State’s Medical Assistance Fraud Act claim.

In the Pharmacia trial, by vacating the jury’s special verdict and counting only drugs that Wisconsin reimbursed based on AWP in recalculating the number of § 49.49(4m) violations, this Court already recognized that non-AWP reimbursements cannot support a Medical Assistance Fraud Act claim. The Wisconsin Supreme Court approved this approach, concluding that to support each violation, the State was required to show that Wisconsin had “relied on [the AWP] at least once in the reimbursement of a pharmacy.” *State v. Abbott Labs.*, 341 Wis. 2d 510, 572-73 (Wis. 2012).⁵ This reasoning also falls squarely in line with Wisconsin case law

⁴ *See* DiPrete Tr. at 236:17-22 (Ex. 24) (agreeing that for Teva drugs, “the vast majority of claims were reimbursed on the basis of a state MAC price as opposed to some other pricing metric”); *id.* at 233:2-7 (same, for Ivax drugs); TAPUF ¶ 21.

⁵ *See also* 341 Wis. 2d at 542 (noting that by requiring proof that the false statement was “made ‘for use in determining rights’” to benefits or payments, “the legislature indicated that Medicaid fraud could be substantiated

which holds that allegedly false statements are not “material” under § 49.49 if those statements had no effect on Medicaid reimbursements. *See State v. Williams*, 179 Wis. 2d 80, 87 (Ct. App. 1993). Here, again, this Court has already adopted *Williams*’ reasoning on materiality to reduce the number of forfeitures in the Pharmacia trial, and as detailed below, there is no logical reason not to extend that holding to general liability under § 49.49(4m).

The fact that a Medical Assistance Fraud Act claim cannot be based on non-AWP reimbursements defeats the State’s Count IV because as detailed below, the State’s own damages expert concedes that over 97% of pharmacy claims for Teva’s drugs at issue here were not reimbursed based on AWPs. By the State’s own calculations, most Teva drugs are thus simply irrelevant to the Medical Assistance Fraud Act count. Accordingly, the Court can and should streamline trial proceedings by granting summary judgment on Count IV for all of Teva’s drugs not reimbursed based on AWPs.

A. For Drugs Not Reimbursed Based on AWPs, the State Cannot Prove that Teva’s Allegedly False AWPs Were Used to “Determin[e] Rights to a Benefit or Payment.”

Wis. Stat. § 49.49(4m)(a)2 prohibits “[k]nowingly mak[ing] or caus[ing] to be made any false statement or representation of a material fact for use in determining rights to a benefit or payment.” Under the State’s theory, the allegedly “false statements” are Teva’s AWPs.⁶ The statute’s plain language thus requires the State to show that Teva’s AWPs were used “in determining rights to a benefit or payment.” *See id.*; accord *Abbott Labs.*, 341 Wis. 2d at 542 (listing the elements of a § 49.49(4m)(a)2 claim, including that the representation was made “for use in determining rights to a benefit or payment in connection with medical assistance.”). The

only by proof that the false statement played some role in the state’s calculation of payments”) (citing Wis. Stat. § 49.49(4m)(a)2).

⁶ *See* Third Am. Compl. at 34, Count IV, Request for Relief (A-B) (requesting damages under § 49.49(4m) for defendants’ “publication and dissemination of their AWP[s]” and seeking forfeitures “for each AWP reported by each defendant for the last ten years.”).

problem for the State, though, is that this requirement rules out almost all of Teva's drugs under Count IV: Wisconsin Medicaid reimbursed virtually none of Teva's drugs based on AWP, and Teva's AWP for those drugs were thus not used "in determining rights to a benefit or payment."

To grant summary judgment on Count IV for all of Teva's drugs that were not reimbursed based on AWP, this Court need only look to what it did in Pharmacia. At trial there, the State had sought damages both as to Pharmacia's generic and brand name drugs. *See Abbott Labs.*, 341 Wis. 2d at 545 (noting that the State's damages expert had "explained to the jury how he calculated Wisconsin's damages for both brand name and generic drugs"). On a special verdict, the jury found that Pharmacia committed 1,440,000 Medical Assistance Fraud Act violations. *Id.* at 519. This Court then vacated that finding as unsupported by the evidence—concluding that the jury had "completely missed the boat" as a result of the State's urging adoption of "an unsustainable theory of recovery" that "equat[ed] claims paid with misrepresentations made," *id.* at 561—and reduced the number of violations from 1,440,000 to 4,578, or just over 0.3% of the jury's finding. *See id.*

To calculate these 4,578 violations, the Court "search[ed] the record for the number of times that FDB [First DataBank] conveyed to Medicaid . . . **a false AWP** for a Pharmacia product **that Medicaid then used**, at least once, in the reimbursement of a pharmacy." *Id.* at 561-62 (emphasis added).⁷ The Court's post-trial recalculation of Medical Assistance Fraud Act violations counted only those drugs for which a "false" AWP was actually used by the

⁷ *See also* Decision and Order on Remaining Forfeitures Issues at 2, *State v. Abbott Labs, et al.*, No. 04-CV-1709 (Wis. Cir. Ct. Sept. 30, 2009) ("Pharmacia Forfeitures Order") (attached as Ex. 63) (finding that evidence in the record supported a finding that Wisconsin Medicaid "reimbursed pharmacies for dispensing certain Pharmacia drugs (largely patent drugs; *sometimes, but only rarely generics*) based upon these published AWP") (emphasis added).

Wisconsin Medicaid in reimbursement—which necessarily excludes all claims that Wisconsin did not reimburse based on AWP’s.⁸

The Wisconsin Supreme Court affirmed this Court’s reasoning on appeal, further confirming that only drugs actually reimbursed based on AWP’s can support a Medical Assistance Fraud Act claim. The Wisconsin Supreme Court expressly rejected the State’s theory that a violation took place “every time Medicaid overpaid for a drug,” *id.* at 572—which would have disregarded AWP’s altogether—concluding that this theory “flies in the face of the statute’s plain language, as well as every judicial decision on the issue.” *Id.* at 565-66. And it also rejected the approach whereby a violation occurred every time the manufacturer simply “reported an inflated AWP” to First DataBank. *Id.* at 572-73.

Instead, the Wisconsin Supreme Court blessed the approach articulated by this Court, concluding that a Medical Assistance Fraud Act “violation occurred every time FDB transmitted an inflated AWP to Medicaid *and Medicaid then relied on it* at least once in the reimbursement of a pharmacy.” *Id.* (emphasis added).⁹ Elsewhere in the opinion, the court acknowledged that Medicaid fraud can be “substantiated only by proof that the false statement played some role in the state’s calculation of payments.” *Id.* at 542. Thus, under the approach adopted by this Court and approved by the Wisconsin Supreme Court, to establish each § 49.49(4m) violation, the State must prove at least the following: (1) Teva provided an inflated AWP to First DataBank;

⁸ See Pharmacia Forfeitures Order at 2 (Ex. 63) (acknowledging record evidence that the Wisconsin Medicaid “reimbursed pharmacies for dispensing certain Pharmacia drugs (largely patent [*i.e.*, brand-name] drugs, *sometimes, but only rarely* generics) based upon . . . published AWP’s) (emphasis added).

⁹ See also 341 Wis. 2d at 574 (concluding that “the best measure of how many violations occurred” was “the number of times FDB transmitted to Medicaid an inflated AWP provided by Pharmacia *and used at least once* by the state in the Medicaid reimbursement process”) (emphasis added); *id.* (“the fraud [under § 49.49(4m)] . . . could not have been realized until the inflated AWP’s reached Medicaid through FDB; for until that happened, *the inflated AWP’s could not have played any role in the calculation of reimbursements, where the injury occurred*”) (emphasis added).

(2) First DataBank transmitted that AWP to Wisconsin Medicaid; and (3) the State then relied on that AWP at least once for reimbursement. *See id.* at 574.

This third requirement—that Wisconsin must have actually relied on Teva’s “inflated” AWP in its reimbursements for a Medical Assistance Fraud Act violation to occur—defeats Count IV. As the State’s damages expert Dr. DiPrete conceded, the overwhelming majority of claims for Teva’s drugs were *not* reimbursed based on AWPs: only “2.3% of the Medicaid claims for Teva drugs” and only “2.54% of the Medicaid claims for Ivax drugs” were reimbursed “based on a discounted AWP.” TAPUF ¶ 32. Thus, over 97% of Teva’s and Ivax’s drugs were not reimbursed based on AWPs.

Moreover, while Dr. DiPrete also purported to calculate the total number of Teva’s and Ivax’s drugs that Wisconsin reimbursed during the damages period (presumably to provide the basis for computing the number of penalties under § 49.49(4m)), TAPUF ¶ 75, these calculations are largely beside the point. Dr. DiPrete conceded that his calculations do not parse out the number of times Wisconsin Medicaid had actually relied on Teva’s AWPs for reimbursement (the relevant inquiry here), and instead simply compute the *total* number of reimbursements for Teva’s drugs—regardless of whether those reimbursements were based on AWPs or some non-AWP metric such as MACs.¹⁰ Because Dr. DiPrete concedes that only 2.3% of Teva drugs and only 2.54% of Ivax drugs were reimbursed based on AWPs, TAPUF ¶ 32, these calculations bear almost no relevance to the State’s alleged overpayments for Teva drugs.

In Dr. DiPrete’s own words, the “vast majority” of claims for Teva’s drugs were not reimbursed based on AWPs. TAPUF ¶ 21. And Dr. DiPrete’s conclusions that most of Teva’s

¹⁰ DiPrete Tr. at 238:13-239:5 (Ex. 24) (this calculation is not “counting the number of claims that are reimbursed on the MAC as opposed to the AWP,” and instead “[i]t’s counting whether an NDC was reimbursed in a given period.”); *id.* at 237:18-238:2 (unable to say to what extent this calculation includes “reimbursements that were not paid based on an AWP minus formula”); TAPUF ¶75.

AWPs played no role in Wisconsin's reimbursements are further buttressed by the undisputed record evidence. Everyone—including the State's witnesses—agrees that Wisconsin Medicaid did not take AWP into account when reimbursing for MAC drugs. TAPUF ¶ 27. The evidence is undisputed that most of Teva's AWP were not used by the Wisconsin Medicaid to “determin[e] rights to a benefit or payment,” as § 49.49(4m) requires. The Court should enter summary judgment on Count IV for all but 2.3% of reimbursement claims involving Teva's drugs and all but 2.54% of reimbursement claims involving Ivax's drugs.

B. For Drugs Not Reimbursed Based on AWP, the State Cannot Prove that Teva's Allegedly False AWP Were “Material” Under the Medical Assistance Fraud Act.

The State's Count IV is flawed in another key way: because Wisconsin indisputably did not use AWP in reimbursing claims for most of Teva's drugs, Teva's allegedly false AWP for those drugs also could not have been “material”—another required element of the Medical Assistance Fraud Act. *See* Wis. Stat. § 49.49(4m) (prohibiting “[k]nowingly mak[ing] or caus[ing] to be made any false statement or representation of a *material fact for use* in determining rights to a benefit or payment.”) (emphasis added). “Materiality is an element of medical assistance fraud,” *State v. Williams*, 179 Wis. 2d 80, 87 (Ct. App. 1993), and the State cannot carry its burden on this element for most of Teva's drugs at issue here.

Williams makes clear that statements that have no effect on the amount of Medicaid reimbursements are immaterial, and compels summary judgment here. There, home health care aides were convicted for Medicaid fraud under § 49.49 for misreporting dates on which they provided patient services. 179 Wis. 2d at 85-86. The aides argued that the trial court erred by excluding evidence that the total number of hours they reported to Medicaid was the number of hours they actually worked (even if not on dates they had reported), which they argued showed that “the false statements were not material to the amount of medical assistance benefits

received.” *Id.* at 86. The appellate court reversed the convictions because of this “erroneous preclusion of evidence.” *Id.* at 85. It concluded that the evidence of the total hours the health care aides worked was “directly relevant to the materiality of [their] alleged false statements,” and that “[i]f the false statements did not affect the amount of benefits or payments made, an issue of materiality is raised. If the statements had no legal effect, the court could determine as a matter of law that the false statements were not material.” *Id.* at 87-88 (emphasis added).

Under *Williams*, a defendant’s false statements that have no effect on Medicaid reimbursements are thus immaterial as a matter of law. *See id.*; accord *State v. Munz*, 198 Wis. 2d 379, 383-84 (Ct. App. 1995) (“[I]n *State v. Williams* . . . , a medical assistance fraud case upon which [appellant] relies, we concluded that statements must have legal effect to be material.”). This lack of materiality is precisely what the State’s expert concedes is true for most of the State’s claims against Teva: over 97% of claims involving Teva’s drugs *were not* reimbursed based on AWP’s, TAPUF ¶ 32, and Teva’s purportedly “false” AWP’s for those drugs therefore played no role in Wisconsin’s reimbursements. The State’s own expert provides this Court with all the evidence it needs to find that most of Count IV fails as a matter of law.

To grant summary judgment for Teva under *Williams*, the Court need only look to what it did in *Pharmacia*. In ruling on *Pharmacia*’s § 49.49(4m) forfeitures, the Court recited in detail the facts and reasoning of *Williams*, recognized the “lethal attack” it presents against the Medical Assistance Fraud Act claim, and concluded that “*Williams*’ analysis . . . controls here.” *Pharmacia Forfeitures Order* at 4, 6 (Ex. 63).¹¹ Applying *Williams*, this Court held that “where *Pharmacia*’s false AWP’s were not actually ‘use[d] in determining rights to a benefit or payment,’

¹¹ *See also id.* at 5 (noting that *Williams* “appears to ordain the result here.”); *State v. Abbott Labs.*, No. 2010AP232-AC, 2011 WL 2039396, at *6 n.5 (Ct. App. May 25, 2011) (noting, in certifying the *Pharmacia* appeal, that this Court had “found that under [*Williams*] . . . , in order to show materiality, the State had to prove that each false statement proven resulted in an overpayment.”).

they are not material under § 49.49(4m), and thus cannot support forfeitures.” *Id.* at 6 (emphasis added).¹²

This Court then rejected the number of forfeitures urged by the State because “the credible evidence fail[ed] to support the materiality” of many of Pharmacia’s alleged misrepresentations. *Id.* And, because the State had failed to carry its burden of establishing “not only the number of misrepresentations Pharmacia made or caused to be made, but that at least one pharmacy reimbursement claim was actually paid based upon each of these misrepresentations,” the Court reduced the number of forfeitures to 4,578—concluding that there was “no way” to determine from the record how many more alleged misrepresentations “if any, resulted in a reimbursement to a pharmacy, as required by *Williams*.” *See id.* at 7.

The Court has thus already determined that under *Williams*, false AWP are immaterial under § 49.49(4m) if they in fact were not used for Medicaid reimbursement. And while the Court reached this conclusion in the forfeitures context, this reasoning squarely applies to general liability as well—because materiality is a requirement for liability under § 49.49(4m), and imposing forfeitures requires no additional elements after that liability has been proved. *See* Wis. Stat. § 49.49(4m)(b) (“A person who *violates* this subsection *may* be required to forfeit not less than \$100 nor more than \$15,000 for each statement, representation, concealment or failure.”) (emphases added). Put otherwise, materiality of Teva’s AWP for Wisconsin’s reimbursements is not a forfeiture-specific requirement, but rather a prerequisite to imposing liability under the Medical Assistance Fraud Act with which to begin. *See* Wis. Stat. § 49.49(4m)(a)2 (requiring a false statement “of a material fact” as one of the elements). As a

¹² *Accord id.* at 4 (“Did a particular Pharmacia AWP result in one overpayment, or thousands, or none? If none, can the misrepresentation be the basis for the forfeiture? The answer, according to *Williams*, is no.”); *see also id.* at 6 (interpreting *Williams* as holding that § 49.49 “prohibit[s] not simply false statements or representations in any application for a medical assistance benefit or payment, but only such false statements or representations *which actually affected* the amount of benefits or payments paid.”) (emphasis added).

result, if the State cannot show that Teva's AWP's were material for Wisconsin's reimbursements—and for most of Teva's drugs, the State plainly cannot make this showing—the Medical Assistance Fraud Act claim fails as a matter of law both as to general liability and as to forfeitures.

As in Pharmacia, the State lacks evidence that Wisconsin Medicaid used Teva's AWP's for many of its reimbursements, and thus cannot establish that those AWP's were "material" under § 49.49(4m). Unlike in Pharmacia, though, this point is uncontested even before the trial has begun—because the State's own expert concedes that Wisconsin reimbursed almost all claims for Teva's drugs on some metric other than Teva's AWP's. Given these admissions, there is no need to confuse the jury with evidence concerning Teva's drugs on which the State cannot prevail as a matter of law. Nor should the Court permit the State to lead the jury astray as it did in Pharmacia, where the jurors erroneously adopted the "unsustainable theory of recovery" urged by the State in closing arguments, *see Abbott Labs.*, 341 Wis. 2d at 561, requiring lengthy post-trial briefing and vacatur of the jury's special verdict to undo the error. The Court should grant summary judgment to Teva on Count IV.

II. The State Cannot Prove Either Its Medical Assistance Fraud Act or Deceptive Trade Practices Act Claim for the Time Period After 2001, When Teva Switched from AWP's to SWP's.

The State's core claim is that the prices Teva had reported for its drugs were in some way false and misleading. To prevail on its Medical Assistance Fraud Act claim (Count IV), the State must prove that Teva's reported prices were "false statement[s] or representation[s] of a material fact." *See* Wis. Stat. § 49.49(4m)(a)2. Similarly, to prevail on its Deceptive Trade Practices Act claim (Counts I and II), the State must establish that Teva's reported prices were "untrue, deceptive or misleading." *See* Wis. Stat. § 100.18(1).

Teva's reported prices—its “statements”—can broadly be subdivided into two categories: average wholesale prices or AWP (which Teva reported until about 2001), and suggested wholesale prices or SWP (to which Teva switched thereafter). Teva is confident that at trial, the jury will find that the State's contentions about AWP are meritless.¹³ As to SWP, though, the State's claims can be disposed of as a matter of law: SWP are neither “false” under § 49.49(4m) nor “untrue, deceptive or misleading” under § 100.18(1). Teva's post-2001 SWP cannot support Counts I, II, and IV. The Court should enter summary judgment on those claims accordingly.

In about 2001, Teva began using SWP instead of AWP in its communications with state Medicaid agencies such as Wisconsin Medicaid. TAPUF ¶¶ 50-51. Aiming to provide “additional clarity as to what the figure represents,” TAPUF ¶ 50, the SWP were accompanied by explicit disclaimers that made it even clearer that SWP are not actual transaction prices by stating: “Suggested wholesale prices *do not reflect the actual cost* to the pharmacy or charge to the customer.” TAPUF ¶¶ 51 (emphasis added). Wisconsin began receiving these SWP from Teva together with the accompanying disclaimers as early as 2001, and continued to receive them thereafter. TAPUF ¶ 51.

As the word “suggested” plainly communicates, SWP were not—and were never purported to be—actual prices or actual averages of prices. This plain meaning of the word “suggested” was further reinforced by the accompanying explicit disclaimers, which unambiguously informed payors (including Wisconsin Medicaid) that SWP “do not reflect” actual prices. In light of the unambiguous meaning of the word “suggested,” strengthened further by the disclaimers, the SWP were neither “false” nor “untrue, deceptive or misleading.”

¹³ Teva recognizes that in *Pharmacia*, this Court denied summary judgment on the State's § 100.18(1) claim as to AWP and does not re-raise that issue. Teva's argument here is limited to the State's § 100.18(1) claim to the extent that claim is based on Teva's post-2001 SWP.

As such, Teva's SWPs do not and cannot provide the basis for the State's § 49.49(4m) or § 100.18(1) claim.

SWPs are not "false" under § 49.49(4m). The State cannot show that Teva's SWPs were false. While Plaintiff contends that AWP's are "false" because they are not actual averages of prices, nothing about SWPs or the term "suggested" indicates that SWPs are actual averages. After 2001, Teva began sending out materials which stated that it was providing "suggested" prices. TAPUF ¶¶ 50-51. Thus, even if AWP's could arguably be considered "false" because they did not represent actual price averages (a point that Teva contests), the same cannot be said of SWPs because they represented just what they purported to represent—Teva's *suggested* wholesale prices. And even if there could be any doubt as to what "suggested" meant, any confusion would have been dispelled by Teva's disclaimers—which unequivocally stated that SWPs "do not reflect the actual cost." TAPUF ¶ 51.

SWPs are not "untrue" under § 100.18(1). Under § 100.18(1), "[a] statement is untrue if it is false[.]" *Uebelacker v. Paula Allen Holdings, Inc.*, 464 F. Supp. 2d 791, 804 (W.D. Wis. 2006); *see also Tim Torres Enters., Inc. v. Linscott*, 142 Wis. 2d 56, 65 n.3 (Ct. App. 1987) ("[A] statement is untrue which does not express things exactly as they are.") (alteration in original) (citation and internal quotation marks omitted). For the same reason that Teva's SWPs were not "false" under § 49.49, they were not "untrue" under § 100.18(1). Rather, Teva stated—truthfully and "express[ing] things exactly as they are," *Linscott*, 142 Wis. 2d at 65 n.3 (citation and internal quotation marks omitted)—that SWPs did not reflect actual costs. Teva's disclaimers that accompanied these communications further reinforced the plain meaning of the word "suggested," negating any possibility of confusion.

SWPs are not “deceptive or misleading” under § 100.18(1). “[A] statement is deceptive or misleading if it causes a reader or listener to believe something other than what is in fact true or leads to a wrong belief.” *Uebelacker*, 464 F. Supp. 2d at 804 (citation and internal quotation marks omitted). The State cannot make this showing for SWPs. It is difficult to see how anyone at Wisconsin Medicaid reasonably could have been misled into thinking that a “suggested” price in fact means an “actual” price (which is what the State implicitly argues), particularly in light of the SWP disclaimers that unequivocally stated the opposite: “Suggested wholesale prices do not reflect the actual cost to the pharmacy or charge to the customer.” TAPUF ¶ 51. And, again unlike AWP—*s*—which the State claims Teva falsely reported as actual average wholesale prices—SWPs by definition are only *suggestions*, and in no way purport to represent actual prices. Under any reasonable reading of “suggested,” particularly as further buttressed by Teva’s explicit disclaimers, SWPs cannot be “deceptive or misleading” under § 100.18(1).

III. Teva Is Entitled to Summary Judgment on the Wisconsin Trust and Monopolies Act Claim Because the State Has No Proof of Anti-Competitive Harm.

Count III alleges that Teva violated Wis. Stat. § 133.05(1), the Trust and Monopolies Act, by providing secret discounts and rebates. Third Am. Compl. ¶¶ 87-91. In particular, the State claims that Teva “discounted secretly from [its] published prices with the intent and effect of injuring competition and creating artificially inflated markets and market prices for their products,” and “paid Pharmacy Benefit Managers secret discounts, rebates, and other economic benefits with the intent and effect of artificially inflating the private payer market for their products.” *Id.* ¶ 88. But with discovery closed, it is clear that the State lacks proof that Teva’s alleged conduct caused any anti-competitive harm—a necessary element of a § 133.05(1) claim. This Court previously granted summary judgment for Pharmacia as a result of the State’s failure

to prove this same element; because the State has not filled this evidentiary gap in its case against Teva, summary judgment should be granted for Teva as well.

Proof of anticompetitive harm is a required element of the State's § 133.05(1) claim. *See* Wis. Stat. § 133.05(1) (prohibiting secret payments that “injur[e] or tend[] to injure a competitor or destroy[] or tend[] to destroy competition”); *Landig*, 129 Wis. 2d at 369 (“[I]t is necessary to prove that the secret rebate had an effect upon a competitor or an effect upon competition.”). This Court has already recognized this well-settled requirement in this litigation, concluding that “both the express wording of the statute and its attendant case law require proof that the secret rebate injured or tended to injure a competitor, or destroyed or tended to destroy competition.” Decision and Order on Summary Judgment Motions Relating to Defendant Pharmacia at 3, *State v. Abbott Labs., et al.*, No. 04-CV-1709 (Wis. Cir. Ct. Jan. 21, 2009) (“Pharmacia SJ Order”) (attached as Ex. 64).

Because harm to competition is a complex issue beyond knowledge of lay jurors, this element must be established by expert testimony. *See Conley Pugl'g Grp. Ltd. v. Journal Commc'ns, Inc.*, 265 Wis. 2d 128, 157, 165 (Wis. 2003) (affirming summary judgment where proffered expert testimony was insufficient to establish that defendant's conduct was an anticompetitive practice, and noting that the case involved “precisely the sort of complex matters for which experts are needed.”), *abrogated on other grounds by Olstad v. Microsoft Corp.*, 284 Wis. 2d 224 (Wis. 2005).¹⁴ While this Court previously declined to decide whether expert testimony on anticompetitive harm is required (because the State had neither expert nor lay evidence on this element), it acknowledged that “Pharmacia show[ed] that, in light of the

¹⁴ *See also Estate of Rille ex rel. Rille v. Physicians Ins. Co.*, 300 Wis. 2d 1, 22 n.22 (Wis. 2007) (as a general matter, “[e]xpert testimony is required on those matters involving special knowledge or skill or experience on subjects which are not within the realm of the ordinary experience of mankind and which require special learning, study or experience.”) (citation and internal quotation marks omitted).

complexity of the pharmaceutical market, expert testimony is required to demonstrate a tendency for harm to a competitor or for destruction of the marketplace—and perhaps even to define the relevant marketplace[.]” Pharmacia SJ Order at 4, 6 (Ex. 64).

The Court was correct: the marketplace here involves dozens of drug manufacturers, several wholesalers, and scores of pharmacies—all, moreover, operating under various rules and restrictions set forth by Wisconsin Medicaid, the Wisconsin Legislature, and federal law. Even the basic operation of this complex market—let alone the alleged anticompetitive effects, if any, of Teva’s conduct on that market—is far outside the knowledge of lay jurors, and thus requires expert testimony.¹⁵ The State’s experts fail to carry the burden on this element, though, and this lack of evidence is fatal to Count III. *See, e.g., Kinnick v. Schierl, Inc.*, 197 Wis. 2d 855, 862 (Ct. App. 1995) (“When expert testimony is required and is lacking, the evidence is insufficient to support a claim.”).

Dr. Gerard Anderson is the same liability expert that the State used in Pharmacia. At that time, the Court recognized at summary judgment that the State had “no real direct evidence from an expert that, yes, Pharmacia’s pricing structure or pricing information has had an anticompetitive effect because of X, Y, and Z, a reasonable probability based upon these numbers”¹⁶—and concluded that Dr. Anderson’s opinions were not evidence of anticompetitive harm.¹⁷ Dr. Anderson’s expert opinions against Teva are virtually identical to those in

¹⁵ Tellingly, Plaintiff has designated an expert—Dr. Gerard Anderson—to explain to the jury the basics of the Medicaid program, drug reimbursements, and Wisconsin Medicaid’s reimbursement methodology. *See generally* Anderson Rep (Ex. 62). If the State needs an expert just to explain the fundamentals of drug reimbursement to the jurors, it is difficult to imagine how the State could show competitive harm in this complex market without relying on expert testimony.

¹⁶ Tr. of Hrg. on Mot. for Summary Judgment at 123, *State v. Abbott Labs, et al.*, No. 04-CV-1709 (Wis. Cir. Ct. Jan. 7, 2009) (“Pharmacia SJ Oral Arg.”) (excerpts attached as Ex. 65).

¹⁷ *See* Pharmacia SJ Oral Arg. at 122-23 (Ex. 65) (“[The Court:] Is there other evidence that you’ve got of an anticompetitive impact? Because I don’t see it in your experts’ reports, frankly.”); Pharmacia SJ Order at 4 (Ex. 64) (noting that Plaintiff’s summary judgment opposition did not cite additional expert testimony “that bears on the

Pharmacia, and fail for the same reason. He still makes no attempt to define a market, and does not even attempt to say how Teva's alleged actions harmed the competition. TAPUF ¶70. Nor does Dr. Anderson provide other evidence the Court has previously made clear is needed, like opining to "a reasonable probability" that Teva's "pricing structure has had an anticompetitive effect[.]" See Pharmacia SJ Oral Arg. at 123 (Ex. 65); TAPUF ¶ 70. Dr. Anderson's opinions failed to establish anticompetitive harm in Pharmacia, and he fares no better here.

The State's only other expert, Dr. DiPrete, does not plug this evidentiary hole in the State's case. Dr. DiPrete's opinions are confined to an estimate of the State's damages. TAPUF ¶ 72. He disclaimed any opinions as to whether Teva's conduct even caused any damages to Wisconsin, let alone offer opinions that Teva harmed the competition. TAPUF ¶¶ 73-74. Dr. DiPrete also repeatedly disclaimed any substantive opinions on liability, TAPUF ¶ 73, and admitted that his damages opinions were essentially limited to mechanical calculations, stating that he was "asked to compare the difference between these average wholesale prices published by First DataBank and the actual average wholesale prices that were paid by purchasers for these drugs[.]" TAPUF ¶ 72. But these mechanical calculations of damages based on presumed liability do not, of course, establish harm to competition—because alleged damages say nothing about the effect (if any) on competition in the pharmaceutical industry. As the Court has already recognized, alleged harm to the State alone does not establish anticompetitive harm,¹⁸ which is what § 133.05(1) requires. See *Landig*, 129 Wis. 2d at 369. Dr. DiPrete's damages calculations offer no support for this key element.

anticompetitive element . . . beyond that quoted by Pharmacia, which undeniably fails to support plaintiff's claim in this regard.).

¹⁸ See Pharmacia SJ Oral Arg. at 123 (Ex. 65) (“[The Court:] There’s certainly information in these [expert] reports that says the State is being damaged because they’re overpaying [for] the drugs. But I’m not seeing anything that’s directed at the other drug companies in terms of whether or not they’re suffering.”)

In short, as to Count III, the State is in the same position as it was in Pharmacia—with discovery closed and with no evidence of anticompetitive harm, the State cannot prove its § 133.05(1) claim against Teva. The Court should enter summary judgment on Count III.

IV. Teva Is Entitled to Summary Judgment on the Unjust Enrichment Claim.

With Count V, the State claims that Teva was unjustly enriched by allegedly providing misleading drug pricing information to the State. *See* Third Am. Compl. ¶¶ 97-100. This claim fails because the State cannot show that it has actually conferred any benefits on Teva—a fundamental requirement for any unjust enrichment claim. Indeed, the State knows it cannot prove this claim: faced with this same argument in the Pharmacia summary judgment briefing, the State withdrew its unjust enrichment count¹⁹—implicitly recognizing that it is not viable.

Without a benefit conferred on defendant by plaintiff, there can be no unjust enrichment because, as the Wisconsin Supreme Court explained, “[u]nder unjust enrichment a person is seeking the return of money actually expended; there must be a benefit conferred upon the defendant by the plaintiff.” *In re Estate of Lade*, 82 Wis. 2d 80, 85 (Wis. 1978) (per curiam); *see also Ludyjan v. Cont’l Cas. Co.*, 308 Wis. 2d 398, 405 (Ct. App. 2008) (“one essential feature of unjust enrichment is a *benefit conferred upon the defendant.*”) (emphasis in original); *Bushard v. Reisman*, 334 Wis. 2d 571, 591 (Wis. 2011) (requiring plaintiff “to show . . . he conferred a benefit on [defendant]”). For example, while plaintiff in *Lade* had argued that Lade’s estate was unjustly enriched when Lade had promised to sell his farm to plaintiff for \$8,000 but the estate then sold it to a third party for \$29,500, the court rejected this argument, because plaintiff “ha[d] made no . . . expenditures or conferred any benefits” on defendant. *Estate of Lade*, 82 Wis. 2d at 85. As the Wisconsin Supreme Court concluded, “[t]his is not unjust enrichment.” *Id.*

¹⁹ *See* Pl. State of Wisconsin’s (Corrected) Response to Pharmacia’s Mot. for Summary Judgment at 57, *State v. Abbott Labs, et al.*, No. 04-CV-1709 (Wis. Cir. Ct. Dec. 10, 2008) (Ex. 2) (“ . . . the State voluntarily withdraws its claim of unjust enrichment against Pharmacia.”).

Neither is this. The State has no evidence that it conferred any benefit on Teva—because while the Complaint alleges that Wisconsin bought drugs at inflated prices (Third Am. Compl. ¶ 97), it is undisputed that the State *never* paid Teva directly for drugs it contends were reimbursed at an inflated level. TAPUF ¶ 3. Without evidence of benefits conferred on Teva by the State, the State’s unjust enrichment claim fails as a matter of law. *See Estate of Lade*, 82 Wis. 2d at 85; *see also Abbott v. Marker*, 295 Wis. 2d 636, 648 (Ct. App. 2006) (affirming dismissal of an unjust enrichment claim in part because “[defendant] has not received a benefit from [plaintiff] which requires him to make restitution”).

While the State also alleges that Teva “obtained increased sales, market share and profits at the expense of Wisconsin and its citizens,” Third Am. Compl. ¶ 99, there is no evidence to support this contention. Here, too, the State would need to show that these alleged benefits were conferred on Teva directly by Wisconsin, as opposed to by third-party pharmacies. But the Teva-specific opinions of the State’s liability expert, Dr. Anderson, say nothing about Teva increasing its sales, market share, and profits—let alone at Wisconsin’s expense. TAPUF ¶ 71. And though Dr. Anderson opines in general terms that increasing the so-called spread “benefits drug companies because they may sell more of their drug,” *id.*, this opinion is equivocal, not Teva-specific, and in any event does not show that Teva’s increased sales (if any) in fact came at Wisconsin’s expense. *See Sulzer v. Diedrich*, 258 Wis. 2d 684, 692-93 (Ct. App. 2002) (concluding that the “elements of unjust enrichment have not been met” where “[w]hile [defendant] may have received a benefit . . . , the benefit was not conferred upon her by [plaintiff]”).

The State’s only other expert, Dr. DiPrete, has opined only as to damages Wisconsin has allegedly suffered and not to any benefit that Teva received. TAPUF ¶¶ 72, 74. But those

opinions are irrelevant because it is well settled that a plaintiff's losses—which is all that Dr. DiPrete purports to calculate—do not establish a defendant's unjust enrichment. *See Mgmt. Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis. 2d 158, 188-89 (Wis. 1996) (“Establishing a loss of profit by the plaintiff does not prove unjust enrichment of the defendant.”) (citation and internal quotation marks omitted); *Ramsey v. Ellis*, 168 Wis. 2d 779, 785 (Wis. 1992) (“damages in an unjust enrichment claim are measured by the benefit conferred upon the defendant”); *Ludyjan*, 308 Wis. 2d at 405 (“the theory of unjust enrichment focuses on the unjust gain *to the defendant*”). Dr. DiPrete's opinions are simply beside the point.

Neither Dr. Anderson nor Dr. DiPrete provide a basis to support the State's unjust enrichment claim. Nor is there any other evidence to show that the State has ever conferred any direct benefit on Teva, let alone evidence that would provide the jury with a solid basis to calculate unjust enrichment damages. *See, e.g., Mgmt Computer Servs., Inc.*, 206 Wis. 2d at 189 (noting, in addressing an unjust enrichment claim, that “damages must be proven with reasonable certainty”); *Halverson v. River Falls Youth Hockey Ass'n*, 226 Wis. 2d 105, 118 (Ct. App. 1999) (affirming judgment for defendant where plaintiff “failed to meet his burden of proof to show that [defendant] received a benefit and, if it did, the amount thereof”). Because the State cannot show it conferred a benefit on Teva, axiomatically, it also cannot show that Teva “knew of the benefit” and “accepted or retained the benefit under circumstances that made it inequitable for [Teva] to retain” it—two other required elements of this claim. *See Bushard*, 334 Wis. 2d at 591. Because the State cannot prove multiple required elements of its unjust enrichment claim, the Court should grant summary judgment for Teva on Count V.

RELIEF SOUGHT

For these reasons, the Court should grant Teva's Motion for Partial Summary Judgment.

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Lester Pines
CULLEN WESTON PINES & BACH LLP
122 West Washington Avenue
Ninth Floor
Madison, WI 53703-2718
Tel: (608) 251-0101
Fax: (608) 251-2883

*Attorney for Defendants Teva Pharmaceuticals
USA, Inc., Ivax Corporation, Ivax
Pharmaceuticals, Inc., and Sicor Inc.*

Of Counsel

Kevin T. Van Wart, P.C. (*pro hac vice* motion pending)
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, IL 60654
(312) 862-2000

Jay Lefkowitz (*admitted pro hac vice*)
Devora W. Allon (*admitted pro hac vice*)
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, NY 10022
(212) 446-4800

Jennifer G. Levy (*admitted pro hac vice*)
Jason R. Parish (*admitted pro hac vice*)
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
Tel: (202) 879-5000
Fax: (202) 879-5200

CERTIFICATE OF SERVICE

I, Lester Pines, hereby certify that on this 19th day of August, 2014, a true and correct copy of the foregoing was served on all counsel of record by Lexis/Nexis File & Serve®.



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